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No. 83-1818

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

Petitioner,

v.

DONNA HYLIN, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF DONALD HYLIN, DECEASED,

Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT, DONNA HYLIN

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The Justice Department's "reply brief" is not a reply brief. It is a supplemental brief seeking reply brief status through a single footnote (Pet. Reply, Br. at 1 fn. 1) incomprehensibly stating that Respondent Hylin, in her brief at p. 3, had conceded that the Justice Department's discretionary function contention in the *Varig Airlines* case is controlling in this case.

Respondent Hylin contended exactly the opposite. On page 3, the very page cited in the Justice Department's footnote, Respondent contended that "no discretion was required" by the government mine inspectors, and that

"Nor does this case involve any discretionary function such as the government contends was involved in *Varig* and *United Scottish.*"

Respondent acknowledged "an issue in common" with *Varig* and *United Scottish* only insofar as the Justice Department had asked the Court to abolish federal tort claim act liability as to any and all federal regulatory activities, regardless of the character of conduct involved (Resp. br., p. 3). The Court has rejected that extreme and unwarranted contention by the Justice Department, leaving no issue in common between this case and *Varig* or *United Scottish.*

The Justice Department's reply brief is simply a post-*Varig* attempt to supplement a "discretionary function" contention to which it appropriately gave minimal attention before *Varig* was decided. The "discretionary function" issue, neither then or now, has merited serious consideration by the parties or the Court in this case.

Nothing beyond reference to Respondent's original brief (esp. Resp. br., pp. 2, 3, 6 and 7) would be warranted on the subject now, except that the Justice Department again, as in its *certiorari* petition, has gone outside the record to imply facts contradicted by the trial record. This time the Justice Department quotes employment and inspection statistics from the *Interior Dept. Ann. Rep. to Congress* 5, 15 (1977) in an effort to draw some analogy between the FAA's usage of scarce resources in airplane certification procedures and MESA's mine safety inspections (Gvt. reply brief at 3, 4).

Notwithstanding that the foregoing document is not in the trial record, that it was not attached to or furnished with the Justice Department's Reply Brief, and that Re-

spondent's counsel has been unable to find a copy of it, the trial record fully rebuts the Justice Department's attempted analogy.

The pretrial stipulation between the government and plaintiff Hylin at the liability trial of this case, included an *agreed statement of facts* containing the following paragraphs:

> Ristokrat, as a clay mine, was subject to the jurisdiction of the Mining Enforcement Safety Administration (MESA). It was MESA's function, under the authority of the Secretary of the Interior, to enforce the provisions of the Metal and Non-Metallic Mine Safety Act, 30 U.S.C., Sec. 721, *et seq.*, as amended, including the promulgation and publication in the Federal Register of Mandatory Safety Standards required to be complied with by mining operators subject to MESA's jurisdicton. MESA's functions in carrying out the act included the inspection and investigation of mines and, on September 1, 1977, and prior thereto, these functions include the issuance of orders requiring mine operators to eliminate dangerous conditions or practices violating the mandatory safety standards, and invoking sanctions to enforce such orders.
>
> On February 10-11, 1977, MESA conducted what it calls a "regular inspection," and then subsequently conducted what it calls "spot inspections" on March 1, 1977, April 4, 1977, May 10, 1977, and July 25, 1977.
>
> A regular inspection is an initial inspection conducted at least once annually. A spot inspection is a follow-up inspection to determine whether violations cited in the regular inspection have been abated.

Going beyond the pretrial stipulation, the trial record demonstrates that MESA's mandatory procedures, dur-

ing the February 10-11 regular safety inspection, required the federal mine inspectors Johnson and Guthrie to inspect every aspect of the operators of the plant for safety and health hazards, including the electrical junction box (Testimony of inspectors Johnson and Guthrie, Trial Transcript 223, 225, 230, 254, and 260-262).

The Justice Department's reply brief is little more than an attempt *dehors* the record to repudiate the agreed statement of facts to which it stipulated at trial and the sworn testimony of two federal mine inspectors.

The mine safety inspection, during which the federal inspectors in this case helped create a death trap, was a *mandatory*, regular, annual inspection. In no sense was it the selective kind of inspection conducted at the discretion of the agency or an inspector, such as in *Varig*. Furthermore, the misconduct alleged and proved was the failure of the federal mine inspector to enforce several *mandatory* safety standards, ones they had no discretion not to enforce, and that, if enforced, would have fully protected plaintiff's decedent against being electrocuted by a defective electrical junction box. The federal inspectors had foreseeably forced mineworkers to come into contact with the junction box hazards because they had shut down another passageway by enforcing a *mandatory* handrail safety standard. In doing so, they violated another mandatory requirement that they not create hazards through their safety inspections. (See Seventh Circuit op., *Hylin v. United States*, 715 F.2d 1206, at 1208-1209, 1213, 1216; see Resp. br. at 2-4, 6-7). Ronald Hollenbeck, the chief sub-regional inspector who was the superior of Guthrie and Johnson, testified that he could conceive of no reason why the violations of the junction box found in the post-

accident investigation should not have been discovered before the accident by the MESA inspectors (Resp. br. App. p. 9).

The FAA regulatory scheme discussed in the *Varig Airlines* and *United Scottish* opinions, *United States v. S. A. Empresa De Viacao Aerea Rio Grandense,* 81 L.Ed.2d 660 (1984), bears no resemblance to the MESA inspections involved in this case. The FAA system placed the burden on aircraft manufacturers to do all necessary testing to achieve airworthiness certification from the FAA, and the FAA engaged in "spot check" inspections according to its discretionary judgment as to the confidence that could justifiably be reposed in the testing of particular aircraft manufacturers in light of their reputation and experience. The Court's opinion emphasized the scarcity of the FAA's resources to evaluate sophisticated aircraft design and to conduct conformity inspections. The Court also noted that the FAA had done no inspections of the prototypes of the aircraft involved in the *Varig* and *United Scottish* cases, that the plaintiffs in those cases were in fact challenging the FAA's discretionary judgment not to do any, and that the discretionary function exception to the FTCA was intended to prevent judicial second-guessing of policy decisions based on social, economic, and political grounds, through the medium of a tort action.

In this case, however, it is the Justice Department doing the second guessing: of MESA, MESA's inspectors, and the Justice Department's own trial counsel, because it was undisputed here at trial that there was an inspection, it was mandatory, a mandatory corrective order was not issued, and a mandatory prohibition against creating hazards was violated.

As the Seventh Circuit stated:

> "If the nearly automatic issuance of the citation here were considered to be a discretionary function, it would be hard to imagine any governmental activity which would be actionable under the FTCA." *Hylin v. United States*, 715 F.2d 1206, at 1214 (7th Cir. 1983).

Respectfully submitted,

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